Sarawak Electricity Supply Corp v MS Shipping Sdn Bhd

HIGH COURT (KUCHING) — ADMIRALTY IN PERSONAM NO KG 1 OF 1994(I)
IAN CHIN J
13 MARCH 2000

Civil Procedure *— Estoppel — Failure to plead — Estoppel raised at plaintiff's closing address — Whether conscionable to allow plaintiff to rely on estoppel*

Shipping and Navigation *— Carriage of goods — Damage and/or loss to goods — No bill of lading — Shipping order used in ordinary course of business — Shipping order, whether amount to document of title to goods — Absence of endorsement subjecting shipping order to Hague Rules — Whether shipping order illegal — Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960, Schedule art IV*

Shipping and Navigation *— Carriage of goods — Damage and/or loss to goods — Act of God — Application of Hague Rules — Whether sinking of vessel due to act of God or peril of the sea — Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960, Schedule art IV*

The plaintiff shipped a consignment of cargo on board the vessel owned by the defendant. The vessel sunk and the plaintiff obtained payment for the lost cargo from the insurer. By right of subrogation, the insurer commenced action against the defendant in the name of the plaintiff. The defendant contended that: (i) the claim was barred because of the plaintiff's failure to give to the defendant written notice within 60 days from the due date of delivery of the cargo as required by cl 9 of the contract; (ii) the defendant was exempted from liability by art IV of the Schedule to the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960 ('the Hague Rules') or under the common law since the loss of the cargo was due to very rough and bad weather, which was a peril or danger of the sea, resulting in the sinking of the vessel and the loss of the cargo. The plaintiff, contended, inter alia: (i) the Hague Rules did not apply to the case because there was no bill of lading but only a shipping order which could not be a document of title; (ii) cl 9 was void under s 29 of the Contracts Act 1950. The defendant argued that the plaintiff should be estopped from maintaining that the provision was void. The plaintiff objected since estoppel had not been pleaded; and (iii) the defendant was in breach of contract or duty.

Held, dismissing the claim:

(1) The shipping order was as good as being a document of title as without it the plaintiff, being the consignee as well as the shipper, would not be able to claim the cargo from the defendant shipping company. There was no evidence that a shipping order had been

used or accepted by the bank for documentary credit but it does not mean that such a document may not be accepted as being similar to a bill of lading for the purpose of the conveyance of cargo from one port to another within Sarawak. This is especially so when a shipping order also has the other important attributes of a bill of lading as in the present case. The shipping order was clearly a document used in the ordinary course of business since it was one of the documents used in the business transaction between the parties over a period of time as proof of the control or possession of the cargo and authorizing the possessor to receive the goods represented by the shipping order. This is notwithstanding the absence of an endorsement on the shipping order that it is subject to the Hague Rules because the failure to comply with reg 4 of the rules did not render the shipping order an illegal document or to render the contract of carriage illegal. In the circumstances, the Hague Rules was applicable (see pp 728H–729F).

(2) The defendant had no occasion to raise the estoppel point until after the plaintiff had raised s 29. Since s 29 was not pleaded in any reply though required to be done by O 18 r 8 of the Rules of the High Court 1980, the defendant would have no opportunity to plead estoppel since s 29 was only hinted when the authorities were served and later raised in the closing address of the plaintiff. That was the only available occasion in which the defendant could raise estoppel. The court could not allow the plaintiff to now say the estoppel point had not been pleaded when this was brought about by the failure of the plaintiff to plead s 29 in a reply. To do otherwise would be to allow someone to take advantage of his own wrong. The plaintiff had caused the contract containing cl 9 to be drafted and the contract had run since 1 April 1990 and during all these time right up to February 2000, just before the closing speeches, there was not a whisper that cl 9 was void. In the circumstances of this case, it would be unconscionable to allow the plaintiff to go back on their words that had been spelt out in cl 9. This means the claim of the plaintiff was time-barred under cl 9 and ought to be dismissed (see pp 732E–733C).

(3) Based on the evidence adduced, the court found that the weather and sea condition brought about the sinking of the vessel and that was an act of God or a peril of the sea within the meaning of the Hague Rules. Even if the Hague Rules did not apply to this case, the result would be the same as the defendant would nevertheless be entitled to rely on the defence of act of God which had been established (see p 740A–B, F–G).

[Bahasa Malaysia summary

Plaintif telah menghantar suatu konsignmen kargo atas kapal yang dimiliki oleh defendan. Kapal tersebut telah tenggelam dan plaintif memperolehi bayaran untuk kargo yang hilang daripada penanggung

insuran. Menerusi hak 'subrogasi', penanggung insuran memulakan tindakan terhadap defendan atas nama plaintif. Defendan berhujah bahawa: (i) tuntutan tersebut dihalang akibat kegagalan plaintif untuk memberikan notis bertulis kepada defendan dalam tempoh 60 hari dari tarikh kargo sepatutnya dihantar seperti yang dikehendaki oleh fasal 9 kontrak tersebut; (ii) defendan bebas daripada liabiliti melalui perkara IV Jadual kepada Peraturan-Peraturan Perkapalan Saudagar (Pelaksanaan Konvensyen-Konvensyen berhubung dengan Pengankutan Barangan melalui Laut dan Liabiliti Pemilik Kapal dan lain-lain) 1960 ('Kaedah-Kaedah Hague') atau di bawah common law kerana kehilangan kargo adalah disebabkan cuaca yang amat buruk, yang merupakan suatu kebahayaan laut, yang menyebabkan ketenggelaman kapal dan kehilangan kargo. Plaintif berhujah, antara lain: (i) Kaedah-Kaedah Hague tidak terpakai kepada kes ini kerana tidak terdapat bil muatan (bill of lading) tetapi cuma satu arahan perkapalan yang tidak mungkin menjadi dokumen hakmilik; (ii) fasal 9 adalah tak sah di bawah s 29 Akta Kontrak 1950. Defendan berhujah bahawa plaintif seharusnya diestop daripada mengatakan bahawa peruntukan itu adalah tak sah. Plaintif membantah kerana estopel tidak diplidkan; dan (iii) defendan telah melanggar kontrak atau kewajipan.

Diputuskan, menolak tuntutan tersebut:

(1) Arahan perkapalan boleh juga dianggap sebagai dokumen hakmilik kerana tanpanya plaintif, sebagai penerima konsignmen dan pihak yang menghantar tidak akan dapat menuntut kargo daripada syarikat perkapalan defendan. Tiada keterangan bahawa suatu arahan perkapalan telah digunakan atau diterima oleh bank sebagai kredit dokumen tetapi ia tidak bermakna bahawa dokumen sedemikian tidak boleh diterima sebagai serupa bil muatan untuk tujuan penghantaran kargo dari sebuah pelabuhan ke pelabuhan lain di Sarawak. Ini terutamanya demikian apabila suatu arahan perkapalan juga mempunyai ciri-ciri penting lain suatu bil muatan seperti dalam kes ini. Arahan perkapalan tersebut jelas merupakan suatu dokumen yang digunakan dalam perjalanan dagangan yang biasa kerana ia adalah salah suatu dokumen yang digunakan dalam transaksi perniagaan di antara pihak-pihak sepanjang suatu tempoh sebagai bukti kawalan atau pemilikan kargo dan memberi kuasa pemilik untuk menerima barangan yang diwakili oleh arahan perkapalan. Ini adalah tanpa mengira ketiadaan pengendorsan pada arahan perkapalan bahawa ia adalah tertakluk kepada Kaedah-Kaedah Hague kerana kegagalan untuk mematuhi peraturan 4 Kaedah-Kaedah tersebut tidak menyebabkan arahan perkapalan menjadi dokumen yang menyalahi undang-undang atau menyebabkan kontrak penyampaian menyalahi undang-undang tak sah. Dalam keadaan ini, Kaedah-Kaedah Hague adalah terpakai (lihat ms 728H–729F).

(2) Defendan tidak mempunyai sebarang sebab untuk membangkitkan hujah berkenaan estopel sehingga selepas plaintif telah membangkitkan s 29. Oleh kerana s 29 tidak diplidkan dalam apa-apa jawapan walaupun dikehendaki oleh A 18 k 8 Kaedah-Kaedah Mahkamah Tinggi 1980, defendan tidak berpeluang untuk memplid estopel memandangkan s 29 hanya berbangkit apabila pihak berkuasa disampaikan dan kemudiannya dibangkitkan dalam hujah penutup plaintif. Itu merupakan satu-satunya peluang di mana defendan boleh membangkitkan estopel. Mahkamah tidak boleh membenarkan plaintif untuk berhujah sekarang bahawa estopel telah tidak diplidkan walhal ini telah berpunca daripada kegagalan plaintif untuk memplid s 29 dalam satu jawapan. Berbuat sebaliknya adalah untuk membenarkan seseorang mengambil kesempatan ke atas salah lakunya sendiri. Plaintif telah menyebabkan kontrak yang mengandungi fasal 9 didrafkan dan kontrak tersebut telah berkuatkuasa sejak 1 April 1990 dan selama ini sehingga bulan Februari 2000, sejurus sebelum ucapan-ucapan penutup, tidak pun disedari bahawa fasal 9 adalah tak sah. Dalam keadaan kes ini, adalah tidak saksama untuk membenarkan plaintif menarik balik kata-katanya yang telah pun tersirat dalam fasal 9. Ini bermakna bahawa tuntutan plaintif dihalang masa di bawah fasal 9 dan sepatutnya ditolak (lihat ms 732E–733C).

(3) Berdasarkan keterangan yang dikemukakan, mahkamah mendapati bahawa keadaan cuaca dan laut menyebabkan kapal tersebut tenggelam dan ia merupakan takdir Tuhan atau suatu bahaya laut dalam rangkuman maksud Kaedah-Kaedah Hague. Andainya Kaedah-Kaedah Hague tidak terpakai kepada kes ini, keputusannya adalah sama kerana defendan tentunya berhak bersandar pada pembelaan takdir Tuhan yang telah pun terbukti (lihat ms 740A–B, F–G).]

Notes

For cases on estoppel generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1666–1713.

For cases on carriage of goods generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1666–1713.

Cases referred to

Ant Jurgens Margarinefabrieken v Louis Dreyfus & Co [1914] 3 KB 40 (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)

Harland & Wolff Ltd v Burns & Laird Lines Ltd (1931) 40 Lloyd's LR 286 (refd)

Lady Gwendolen, The [1965] 2 All ER 283 (refd)

Laurie & Morewood v Dudin & Sons [1926] 1 KB 223 (refd)

Lickbarrow v Mason (1794) 5 Term Rep 683 (refd)
New Zealand Insurance Co Ltd v Ong Choon Lin [1992] 1 MLJ 185 (refd)
Official Assignee of Madras v Mercantile Bank of India Ltd [1935] AC 53 (refd)
Ramdas Vithaldasm Durbar v Amerchand (S) & Co; Ramdas Vithaldas Durbar v Chhaganlal Pitamber (1916) 85 LJPC 214 (refd)
Svenska Traktor Aktiebolaget v Maritime Agencies (Southhampton) Ltd [1953] 2 All ER 570 (refd)

Legislation referred to

Carriage of Goods by Sea Act 1924 art I(c)
Contracts Act 1950 s 29
Evidence Act 1950 s 114
Factors Act 1889 [Eng]
Indian Contract (Amendment) Act 1930 s 178 [India]
Limitation Ordinance
Merchant Shipping (Classification of Coastal Trade Ships) Regulations 1961
Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960, Schedule, regs 2, 4 arts I, IV, VI
Merchant Shipping Ordinance ss 17, 266, 315(5)
Rules of the High Court 1980 O 18 r 8
Sale of Goods Act 1893 [Eng]

Albert Tang (*Chew, Jugah, Wan Ullok & Co*) for the plaintiff.
Leonard Shim (*Reddi & Co*) for the defendant.

Cur Adv Vult

Ian Chin J

Introduction

About 13 January 1992, the plaintiff shipped a consignment of cargo on board Ming Soon Jaya ('the vessel') owned by the defendant MS Shipping Sdn Bhd pursuant to a contract of affreightment dated 1 April 1990. The vessel sank on 16 January. The cargo was insured by the plaintiff who had obtained payment for the loss from the insurer UMBC Insurance Sdn Bhd. By right of subrogation, this action was commenced by the insurer in the name of the plaintiff. The plaintiff claimed that the defendant was in breach of the contract or duty, the particulars of which will be set out later.

The plaintiff claims a sum of RM100,689.05 as representing the value of the lost cargo.

The defence is: (1) the claim is barred for the plaintiff's failure to give to the defendant written notice within 60 days from the due date of delivery of the cargo as required by cl 9 of the contract; and (2) the defendant is exempted from liability by art IV of the Schedule to the Merchant Shipping

(Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960 or under the common law since the loss of the cargo was due to very rough and bad weather, which is a peril or danger of the sea, resulting in the sinking of the vessel and the loss of the cargo.

Facts of case

In the course of the trial it was conceded that the plaintiff had in fact shipped a cargo consisting of cables, wires, electrical goods, engine parts and office stationery valued at RM100,689.05. The vessel left Kuching on 13 January at 2330 hours with the plaintiff's cargo. It was bound for Limbang and thereafter Lawas. According to the log book kept by the master of the vessel, boisterous and rough weather with waves three-metre high and strong north-westerly winds of 40 knots per hour were encountered at 1730 hours on 15 January. The wires holding the deck cargoes snapped and the cargoes then rolled to the right causing the vessel to list and water entered the vessel. The vessel in its attempt to head for Bintulu went aground on 16 January at Kuala Bintulu.

A provision in the contract, drafted by or on behalf of the plaintiff, sets a time limit for the claim which provision the plaintiff argued is void. This issue will be dealt with later. Another issue revolves around the applicability the Merchant Shipping (Implementation of Conventions Relating to Carriage of Goods by Sea and to Liability of Shipowners and others) Regulations 1960 ('the Regulations'). The defendant relied on these regulations for its defence that they are exempted thereunder from liability since the loss was due to a peril or danger of the sea. This is the appropriate place to resolve the issues, dealing first with the question of the application of the Hague Rules.

Whether the Hague Rules apply

Under reg 2 of the Regulations, the rules (which are generally known as and which I shall refer to as the Hague Rules) set out in the Schedule 'shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Sarawak to any other port whether within or outside Sarawak.' Regulation 4 provides that the bill of lading or similar document of title must be endorsed with a statement that it is to have effect subject to the Hague Rules. Under art I of the Hague Rules, the Hague Rules shall only apply to a contract of carriage 'covered by a bill of lading or any similar document of title'. In this case, there is no bill of lading but only the shipping order. That the Hague Rules only apply to a contract of carriage covered by a bill of lading or any similar document of title cannot be disputed. It remains to be considered whether that position has in any way been modified or changed by reg 2 which reads:

> Subject to the provisions of this Part, the rules set out in the Schedule (hereinafter referred to as 'the Rules') shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Sarawak to any other port whether within or outside Sarawak.

A That regulation applies the Hague Rules to every carriage of goods by sea from any port in Sarawak without limiting it to those covered by any bill of lading (or other similar document of title) or not. However reg 4, to which reg 2 is subject to, makes it clear that the Hague Rules are only to apply to contract of carriage covered by a bill of lading or other similar document of title. Regulation 4 says:

B

> Every bill of lading or similar document of title issued in Sarawak which contains or is evidence of any contract to which the Rules apply shall contain an express statement that it is to have effect subject to the provisions of the Rules as applied to this Part.

C This means that reg 2 did not in any way expand the limited application of the Rules, which is, to only contract of carriage covered by a bill of lading or similar document of title. This takes me to consider the next issue of whether the shipping order, is a document of title. Unless it is, the Hague Rules do not apply to the present case.

D *Whether the shipping order is a document of title*

This following shipping order, taking one as an example, it was argued by the defendant, was good enough to pass the title to the goods and therefore can be said to be a document of title within the meaning of the Hague Rules, viz:

E

SHIPPING ORDER
No 59174

SARAWAK ELECTRICITY SUPPLY CORP

Date: 10/1/92

F

Name of Vessel	Ming Soon Jaya	Port of Loading Kuching
Consignee	SESCO Limbang	Port of DischargeLimbang

Freight as shown below payable in *Kuching*

G

Quantity	Description	Freight Charge	
		$	cts
[Etc ...]	[Etc ...]		

H

SESCO CENTRAL STORE KUCHING	
GOODS DESPATCHD BY	
GOODS CHECKED BY	
AUTHORIZED BY	

I

Receipt Certificate Certified the goods quoted above have been received on board the above-vessel in apparent good condition ..... Chinchoo of Vessel	Above articles received in good order. Signed ..... Clerk-in-charge Station .....

Since the shipping order must be a document of title similar to a bill of lading, it is relevant to determine what a bill of lading is. *Halsbury's Laws* (4th Ed) Vol 41, para 946 provides the following definition:

> A bill of lading is a receipt for goods delivered to and received by a ship, signed by the person who contracts to carry them, or his agent, and evidencing the terms of the contract of carriage under which the goods have been so delivered and received. During the period of transit and voyage the bill of lading is recognised by the law merchant as the symbol of the goods described in it, and the indorsement and delivery of the bill of lading operates as a symbolic delivery of the goods.

A signed copy of the bill of lading will then be given to the shipper who will deal with it in a manner befitting the terms of the sale of the cargo if the shipment is the result of such a sale. Some of the ways in dealing with the bill of ladings are these. If the payment for the cargo is to be by way of irrevocable letters of credit, the bill of lading will be presented to the bank concerned for payment and then despatched to the consignee. If payment is to be made say 30 days after delivery or arrival of the cargo at the destination, the bill of lading will be despatched to a bank at the destination accompanied by the appropriate bills of exchange which the consignee must sign before the bill of lading accompanied by the invoice can be given to the consignee for him to exchange it for a delivery order which will be issued by the shipping agent at the destination. The consignee will then have to clear customs before collecting the cargo. The destination bank will on the due date demand payment from the consignee of the amount stated in the bills of exchange. These are notorious facts which I can take note. Such is the nature and purpose of a bill of lading. How, then, does the shipping order compare to a bill of lading? Though it has some of the features, like the name of the vessel, the port of loading and destination, the place of payment of the freight, the description of the cargo, a place for the acknowledgement of the receipt of the cargo, it does not contain the other terms of the carriage, like whether the Hague Rules should apply and what are the excepted perils. However, the evidence shows that if the cargo is to be claimed, the shipping order which the defendant through its '*chin choo*', (Chinese Hokkian phonetic for ship owner) had signed, would have to be produced. The consignee must also sign on a copy of the shipping order acknowledging receipt of the cargo which the plaintiff will then use to obtain payment of the freight from the defendant. Thus, the shipping order is as good as being a document of title as without it the plaintiff, being the consignee as well as the shipper would not be able to claim the cargo from

A the defendant shipping company. There is no evidence that a shipping order had been used or accepted by the bank for documentary credit but it does not mean that such a document may not be accepted as being similar to a bill of lading for the purpose of the conveyance of cargo from one port to another within Sarawak. This is especially so when a shipping order also has the other important attributes of a bill of lading like, an acknowledgement B by the shipping company that the cargo had been received in apparent good condition and that it had been shipped by a consignor. It also, just like a bill of lading, states the destination and the description of the cargo. It is pertinent to ask how a shipper can lay claim to the cargo otherwise then by producing a copy of the shipping order duly signed by the shipping C company? If there is no other way, then, in my view, the shipping order is as good as a document of title. In this regard what was said in *Ramdas Vithaldasm Durbar v Amerchand (S) & Co; Ramdas Vithaldas Durbar v Chhaganlal Pitamber* (1916) 85 LJPC 214 at p 215, is relevant to the present case, viz:

D

> In their Lordships' opinion the only possible conclusion is that, whenever any doubt arises as to whether a particular document is a 'document showing title' or a document of title' to goods ... the test is whether the document in question is used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

E

The test enunciated there I would respectfully adopt for this case. Applying the test, the shipping order is clearly a document used in the ordinary course of business since it was one of the documents used in the business transaction between the parties over a period of time as proof of the control or possession of the cargo and authorizing the possessor to receive the goods F represented by the shipping order. This is notwithstanding the absence of an endorsement on the shipping order that it is subject to the Hague Rules because the failure to comply with reg 4 did not render the shipping order an illegal document or to render the contract of carriage illegal.

Mr Albert Tang, learned counsel for the plaintiff, when arguing that the G shipping order cannot be a document of title referred the court to various cases (some of which were against the plaintiff's case) which I shall now refer to.

The case of *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53 deals with the question of whether a railway receipt is a H document of title within the meaning of s 178 of the Indian Contract (Amendment) Act 1930 which reads: 'A person who is in possession of any goods, or of any bill of lading ..., or any other document of title to goods ... may make a valid pledge of such goods or documents ...'. The features of the railway receipt are these. It bears the names of the consignor and consignees, sometimes with the same entity appearing as both. It contains I a description of the goods, the wagon number, the marks of the bags and the number. It also contains a condition to the effect that the railway receipt must be produced by the consignee or his authorised agent in order to take

delivery and thereafter to acknowledge receipt by signing on the railway receipt. The House of Lords held that the railway receipt is such a document of title. The shipping order has all the essential features as that of a railway receipt, that is, the fact of the shipment by the owner and the need to produce the document to collect the cargo. If a railway certificate can be a document of title, I see no reason why the shipping order cannot be one. In my view it does not matter that the shipper and the consignee are the same person, as was the position in *Ant Jurgens Margarinefabrieken v Louis Dreyfus & Co* [1914] 3 KB 40, where it was held that a delivery order was a document of title within the meaning of the Factors Act 1889 and the Sale of Goods Act 1893 and where the court there, at p 44, said: 'A delivery order is not the less a document of title because it is created by the owner of the goods'.

As for *Laurie & Morewood v Dudin & Sons* [1926] 1 KB 223, it deals with the question of the passing of property and not with the question of what document can constitute a document of title and is, therefore, not relevant.

Another case referred to is *Harland & Wolff Ltd v Burns & Laird Lines Ltd* (1931) 40 Lloyd's LR 286. In that case the shipper and consignee was the same entity which owned the machinery that went under with the ship. For the purpose of an insurance claim and at the request of the shipper/consignee, the shipowner, after the vessel had sunk, gave the shipper/consignee an acknowledgement of the shipment, and which was shipped on and below deck and it bore the words: 'Received, carried, and held subject to terms of quotation and conditions of carriage specified in our sailing bills'. The court there held that the acknowledgement cannot be a bill of lading or a similar document of title. In the course of its judgment the court there, at p 287, said this:

> As appears from the correspondence above referred to, the contract of affreightment in the present case was a highly special one. It was not only not actually 'covered' by a bill of lading, but a bill of lading (as that document is known and used in the custom of merchants) was alien to its purpose. That purpose was not mercantile — for the goods were neither sold nor for sale — but was limited to the transport of machinery which the pursuers had made in their Glasgow shops at Finnieston for a particular ship they were building in their Belfast yard, from Finnieston to that yard. I do not see what contractual part a bill of lading capable of being used as a document of title could have played in such a contract of affreightment, nor how the contract of carriage in this case could have been 'covered' by a bill of lading. Further, I do not think that the defenders, under the special terms of this contract, could have been required by the pursuers to undertake the responsibilities to third parties implied by giving the pursuers a bill of lading. For instance, the pursuers were to supply their own cranage at Belfast.

I am concerned with the statement there — 'That purpose was not mercantile — for the goods were neither sold nor for sale — ...' which I am of the view, may be true in the case of a bill of lading but not necessary so with regard to the position of other similar document of title. There is no need for a cargo to have undergone a sale before the document relating to

A it can be a document of title. There is also no need for the transaction to be a mercantile one before the relating document can be a document of title. In any event the test enunciated in *Ramdas Vithaldasm Durbar v Amerchand (S) & Co, Ramdas Vithaldas Durbar v Chhaganlal Pitamber* is to be preferred.

B It was then argued by Mr Albert Tang that the document, in order for it to be a document of title, must be a transferable document by the custom of the trade as in *Lickbarrow v Mason* (1794) 5 Term Rep 683. But the shipping order in the hands of anyone can be used to claim delivery or possession of the cargo and this means that it is transferable, that the right of possession can be transferred.

C It was also argued that the existence of a contract for two years between the parties meant the parties had contracted out of the Hague Rules and this is allowed under art VI of the Hague Rules. It should be remarked that the plaintiff did not plead that the parties have contracted out of the Hague Rules and I am of the view that the plaintiff should not be allowed to raise this point. In any event, the contract is silent and neutral as regards whether D the Hague Rules is to apply. This point also has no bearing as to the issue of whether the shipping order can be a document of title.

Whether deck cargo excludes the application of the Hague Rules

E Learned counsel further argued that the Hague Rules do not apply because the cargo that was carried on deck and such deck cargo was excepted from the definition of goods rendering the Hague Rules inapplicable. The Hague Rules, art 1, define 'goods' to include articles of every kind 'except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried'. Mr Leonard Shim, learned counsel for the F defendant, replied that under art I of the Hague Rules, its application is excluded 'if the cargo which by the contract of carriage is stated as being carried on deck and is so carried' and the contract in this case did not state that the cargo is being carried on deck. That submission of Mr Shim I am in agreement. This conclusion is more justifiable when one considers *Svenska Traktor Aktiebolaget v Maritime Agencies (Southhampton) Ltd* [1953] G 2 All ER 570 where the court there held that a clause in a bill of lading giving liberty to carry goods on deck did not amount to a statement that the tractor was being carried on deck as to exclude it from the definition of 'goods' in art I(c) of the Carriage of Goods by Sea Act 1924 which is similarly worded as the provision under consideration. Other cases cited by Mr Tang have H been considered by me but not mentioned because they do not have any bearing on my decisions herein.

Thus, in my view the Hague Rules apply. This takes me to the next of issue whether this action is time-barred.

I *Whether the action is time-barred*

As mentioned earlier, the defendant relied on the following provision of the contract to maintain that the plaintiff's action is time-barred, viz:

> 9 The Contractor shall take all precautions against any loss or damage to the goods whilst enroute in accordance with the nature and quality of the Goods that is being shipped by the Contractor. The Corporation shall be entitled to be indemnified against all damage and losses of the Goods shipped. Provided that any claim made hereunder shall be made by the Corporation in writing within sixty days after the Goods is due to be delivered to the Corporation.

The plaintiff maintained that the provision, assuming that order in terms bars any action if the claim was not made in writing within the said 60 days, it is nevertheless void under s 29 of the Contracts Act 1950 because it limits the time within which the Plaintiff may enforce his right. Thus in *New Zealand Insurance Co Ltd v Ong Choon Lin* [1992] 1 MLJ 185 (SC), it was held that the following clause in a policy was void under s 29 at p 191:

> In no case whatever shall the company be liable for any loss or damage after the expiration of twelve months from the happening of the loss or damage unless the claim is the subject of pending action or arbitration.

Since the 60 days' provision of cl 9 has the effect of limiting the time within which the plaintiff can enforce his action which is not a time set under the Limitation Ordinance, it is void under s 29. Learned counsel for the defendant though he did not concede expressly appears to be resigned to accept that as being the position because learned counsel went on to argue that the plaintiff should be estopped from maintaining that the provision is void. The plaintiff's learned counsel riposted by saying estoppel has not been pleaded. A point not taken up by the defendant is that the plaintiff had also not pleaded s 29 which they should do by delivering a reply but did not. This point was canvassed without any complaint from the defendant's counsel. But the defendant had no occasion to raise the estoppel point until after the plaintiff had raised s 29. Since s 29 was not pleaded in any reply though required to be done by O 18 r 8 of the Rules of the High Court 1980, the defendant would have no opportunity to plead estoppel. Since s 29 was only hinted when the authorities were served and later raised in the closing address of the plaintiff's learned counsel, that was the only available occasion in which the defendant could raise estoppel. I do not see how I can allow the plaintiff to now say the estoppel point had not been pleaded when this was brought about by the failure of the plaintiff to plead s 29 in a reply. To do otherwise would be to allow someone to take advantage of his own wrong. Mr Tang also argued, citing *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, that the defendant did not lead any evidence in support of the plead of estoppel. The evidence is cl 9 of the contract. In any event, given the special circumstances which I have just set out and in the interest of justice, I am inclined to allow the defendant to raise the defence of estoppel even though it was not pleaded. It was then argued for the plaintiff that there was no 'encouragement or representation' within the context of *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* and the plea of estoppel must fail. But, as correctly pointed out by Mr Shim, the Federal Court had, at p 345, said this: 'It is wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged

by another to believe in the existence or in the non-existence of a fact.' The Federal Court went on to say that it covers cases where the encouragement comes in the form of silence (p 346). In the present case the plaintiff never claim against the loss from the defendant though they were informed on 21 January 1992 that the vessel had sunk. The plaintiff had proceeded to claim against the insurer and was paid in April and July 1992. The insurer then commenced the present action by right of subrogation on 6 January 1994 and it was not till the closing address in February 2000 that the plaintiff relied on s 29. In the meantime, the captain of the vessel had passed away and thus deprived the defendant of their important witness. The plaintiff had caused the contract containing cl 9 to be drafted and the contract had run since 1 April 1990 and during all these time right up to February 2000, just before the closing speeches, there was not a whisper that cl 9 is void. In the circumstances of this case, it would be unconscionable to allow the plaintiff to go back on their words that had been spelt out in cl 9. This means the claim of the plaintiff is time-barred under cl 9 and ought to be dismissed.

That was not all that was argued in relation to cl 9. Mr Tang had went to tremendous length to argue that cl 9 does not apply because: (1) there is a total loss of the cargo; (2) the non-delivery is a fundamental breach; (3) cl 9 an exemption clause is not clear; (4) cl 9 is only a warranty entitling the defendant to damages only; and (5) cl 9 relieves the defendant from their obligation of indemnity but not from their obligation for breach of contract or negligence. All these matters are not pleaded with the result that Mr Shim had no chance to address the court. They therefore do not warrant consideration.

Despite my ruling disallowing the defendant to amend the defence to include a plea that the plaintiff's claim was time-barred under the Hague Rules, learned counsel for the defendant proceeded to submit that the claim is barred. My short answer is that it is not pleaded and therefore cannot be raised.

What I have decided so far is sufficient for me to dismiss the claim of the plaintiff with costs to the defendant. However, in view of the considerable time in which the plaintiff led evidence regarding the other issues, I am of the view that it is best that I deal with them in case I am wrong in my decision that the claim is defeated by cl 9.

Whether the defendant had observed the Hague Rules

I will deal with the matter firstly on the footing that Hague Rules apply. The plaintiff alleged the following breaches of duty or contract:

(a) failing to ensure the vessel was in a seaworthy condition;

(b) failing to make the holds and all other parts of the ship fit and safe for the reception, carriage and preservation of the cargo resulting in the vessel being unseaworthy and in its sinking;

(c) failing to adequately and properly secure the deck cargo resulting in heavy listing and sinking of the vessel; and

(d) failing to properly and carefully store, keep and care for the cargo; and A

(e) storing the cargo on deck without the permission of the plaintiff.

The defendant denied those allegations and pleaded that the loss of the cargo was caused by an act of God or by the perils or dangers of the sea, defences allowed under art IV of the Hague Rules. It is common ground that before the defence can be relied on, the defendant must show that they B have exercised due diligence as stipulated under art III r 1 and proper care under art III r 2, both of which read:

ARTICLE III
RESPONSIBILITIES AND LIABILITIES

1 The carrier shall be bound, before and at the beginning of the voyage, to C exercise due diligence to —

(a) make the ship seaworthy;

(b) properly man, equip and supply the ship;

(c) make the holds, refrigeration and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, D carriage and preservation.

2 Subject to the provisions of art IV, the carrier shall properly and carefully lad, handle, stow, carry, keep, care for and discharge the goods carried.

3 ...

The burden of proof is stated by *Carver's Carriage By Sea*, Vol 1 (13th Ed), E p 154 in these words:

> Ordinarily, the burden of proving that a loss which has occurred has been due to an excepted cause, falls upon the shipowner who seeks to excuse himself. Thus if there be doubt whether damage to a cargo has arisen from bad stowage, or from excepted perils of the sea, the shipowner relying on the exception must prove that the perils of the sea caused it. And where it appears F that two causes have contributed to the loss, one of which only is excepted, the shipowner must distinguish between the damage which was and was not due to that.

The defendant in order to establish due diligence on their part had adduced evidence that they had complied with all statutory requirements of the G Merchant Shipping Ordinance ('MSO') and its regulations regarding the vessel. In this regard the defendant adduced evidence:

(1) that the vessel was registered in Malaysia after it had been surveyed and measured by a surveyor of ships in compliance with s 17 of the MSO;

H

(2) that it had been issued a load line certificate by virtue of which the vessel was deemed under s 315(5) of the MSO to have been surveyed and marked which in fact was done on 17 June 1991;

(3) that it had been issued a Certificate and Record of Safety Equipment under s 266 of the MSO testifying to the vessel's compliance with the rules for life-saving appliances and to it being properly equipped with I the lights, shapes and means of making fog-signals required by the collision regulations;

(4) that it had been allotted a CA classification (Cargo ship classified for coastal trade limits) under the Merchant Shipping (Classification of Coastal Trade Ships) Regulations 1961 and this is issued depending on the state of seaworthiness of the vessel; CA being the highest, that is the best, classification for a coastal cargo ship with no coastal trade limit; and

(5) the master of the ship Abo bin Yo, since deceased, had been issued a Certificate of Competency to pilot the vessel.

There is also evidence to say that the vessel was under constant maintenance and repair. As for the voyage in question, the loading of the cargo was witnessed and helped by Then Piu Miaw, the *chin choo*. He provided description as to the lashing of the deck cargo and the obtaining of the port clearance, with no endorsement of inclement weather, which is done if there is warning of such by the Meteorological Department. One such evidence concerns the echo sounder.

Absence of echo sounder

The plaintiff had elicited from Sairin bin Rashid, a mate of the vessel and called by the defendants, the following answer in response to a question, viz:

> Q Ship has echo sounder to test depth of water
>
> A No

This evidence was relied on as showing that the vessel was not properly equipped and hence the vessel was unseaworthy which in turn meant that the defendant had failed to exercise due diligence notwithstanding the statutory statement of the surveyor of ships which state the following:

> V That the inspection showed that the ship complied with the requirements of the said Ordinance as regards fire-extinguishing appliances and fire control plans, echo-sounding device and gyro-compass and was provided with navigation lights and shapes, pilot ladder and means of making sound signals and distress signals, in accordance with the provisions of the Regulations and the International Regulations for Preventing Collisions at Sea in force.

Mr Tang then relied on the case of '*The Lady Gwendolen*' [1965] 2 All ER 283 which concerned a radar which the master did not know how to use. It is therefore of no relevance since it does not concern an echo-sounder. In so far as Sairin bin Rashid's reliability as a witness is concerned, I have to conclude that he is totally unreliable and this conclusion was reached with the help of the skilful cross-examination of Mr Tang who had demonstrated this witness to be either an ignoramus or someone who, for reasons unknown, wants to appear stupid. I am of the view that he was totally indifferent as to the truth or otherwise of what he said in court. As a seafarer and a mate, he confessed to not knowing how to determine the position at sea of the vessel nor does he know where the easterly position is by using the rising sun as a guide. He gave too many 'I do not know' or 'I cannot remember' answers as to render him unreliable when the questions should

be able to be answered other than in that way since he was able in relation to the same subject gave positive answers, like how the cargoes were lashed and at which section of the vessel but yet when asked how many doors the engine room has, he answered he could not remember. In any event, this witness was asked about 'echo sounder' and not 'echo-sounding device' which the certificate speaks of. Even assuming that it is safe to accept the evidence of this witness that there is no echo-sounder, that does not mean that the vessel did not have other echo-sounding device. Under s 114 of the Evidence Act 1950, there is a presumption of regularity and this means that once the surveyor of ship had certified that the vessel had echo-sounding device, there must be cogent evidence to rebut that presumption. The evidence I have referred is, for the reasons I have stated, not sufficient for that purpose. It is not in dispute that there are other ways of determining the depth of a particular water other than by way of an echo sounder. A marine chart of a particular locality will provide the detail while a hand held lead drop into the water will also serve the purpose. Therefore, even assuming that there is no echo sounder fitted on the vessel, that does not mean that the vessel was not seaworthy. It must also be shown that the vessel has no chart and no lead to determine the depth of the water before it can be said that the vessel was unseaworthy. Since by the issue of the certificate, it can be presumed that the master or its crew of this vessel must be able to tell the depth of any particular water and since it can be presumed that a master will not go to sea without any such equipment or aid as that would be putting his own life at risk, it falls on the plaintiff to establish that there is no such other aid at all. In this regard, the plaintiff had also failed to do so.

Before the evidence was led in this case, the plaintiff had absolutely no evidence to back their allegation that there was a failure to exercise due diligence or the vessel was unseaworthy with the result that there is no pleading to spell out the particulars with regards thereto. Mr Tang confessed at the hearing that the plaintiff hope to elicit evidence from the defendant's witnesses before they called their expert witness to support whatever case that can be found to support their allegation that due diligence was not exercised or that the vessel was not seaworthy. In the end, just about every thing concerning the vessel and the cargo was questioned in what can be described as a fishing expedition by the plaintiff. The defendant did not attack the pleading at the appropriate stage of the proceedings. The evidence thus elicited were to be the foundation for the following contentions of the plaintiff that the defendant had breached its duty or contract or that the vessel was unseaworthy. I will use the same topical headings Mr Tang had used.

Improper cargo handling/stowage etc

For this purpose learned counsel had referred to the following passage of 43 *Halsbury's Laws* (4th Ed) para 598:

> A ship seaworthy in herself may be rendered unseaworthy by reason of her cargo. It is essential that she should be fit to encounter the perils of the voyage

A as a laden ship. A ship cannot, therefore, be regarded as seaworthy if she is overloaded at the time of her departure, or, more accurately, at the commencement of the stage of the adventure next after the loading, or if she carries on deck goods which, having due regard to the safety of the ship, ought not to be carried there. Similarly, the ship may be rendered unseaworthy by the method of storage adopted.

B That as a general statement of the law it is correct there is no argument. Mr Tang appears to me to contend that the ship was rendered unseaworthy because: (1) an able seaman, that is the *chin choo*, rather than the master or the officer was in charge of the loading and lashing of the cargo; (2) there is no evidence that the master or officer had checked the loading, stowage and C lashing of the cargo; (3) all the deck cargo moved to the right due to the absence of lashing or improper lashing; (4) the lashings were done criss-crossing and thus obstructing the deck walkway which interfered with the inspection at the onset of changing weather condition; (5) there is no evidence as to how the hold cargo was held in place; and (6) the officer Sairin bin Rasid did not know anything about the stability booklet which D contains information about the stability of the vessel which it must have under ss 159 and 160 of the MSO and this means the vessel was not properly equipped. The best witness would be the master of the ship but he had passed away. The *chin choo* testified to the nature of the wire ropes used for and the manner of lashings. There is nothing wrong with him doing or E supervising the same as long as the master had the last say in the matter. He testified that the master would not sail unless he was satisfied that the lashings were properly done. He was not asked whether the master did in fact check. However, in view of the death of the master, and since the vessel did sail, I am incline to assume that the master must have sailed after checking the storage of the deck cargo. More so since as a matter of course, F as testified by the *chin choo*, the master would not sail if he was not satisfied with the storage of the cargo. Therefore, just because the master cannot come to court to say whether he checked the storage of the cargo before he set sail and just because nobody bothers to ask whether the *chin choo* saw the master checking the storage of the cargo cannot be ground for the conclusion that the master did not check at all. Given the course of event G which follows a loading of cargo satisfactory to master, it would be incumbent on the person who alleged that there was no inspection by the master before he set sail to produce the evidence. As for point (3), the *chin choo* had given extensive evidence which I cannot find any reason to reject, notwithstanding that he was an *alter ego* of the defendant. It can be deduced H from the evidence that all deck cargoes were lashed. Therefore, there is no substance in the contention that the cargoes, including the *Pajero* vehicle, were not lashed and hence the reason for their moving to the right side of the vessel. As for improper lashing the other reason speculated by the plaintiff as being the cause of the cargoes moving to the right of the ship, here again we have the evidence of the *chin choo*, that the lashings broke I causing the cargoes to move to the right. When the *chin choo* gave evidence regarding the lashings, he was never questioned as regards the improper manner of the lashing which Mr Tang now surmise. It was also not put to

him that the lashing of the *Pajero* did not break. It was also not put to him that the lashing of all the cargoes were improperly secured. Again, there is nothing in the evidence for me to reject the evidence of the *chin choo* nor for me to conclude that the lashings were not properly done. As for the hold property, again there was no indication that it was going to be alleged that the hold cargoes were not properly stowed or secured. The plaintiff had conducted their cross-examination directed only at the deck cargoes and other matters and none concerning the hold cargoes. This conveyed the impression that no complaint is directed at the hold cargoes. Again, since it is in evidence that the master would not sail if he had not checked the cargoes and was satisfied that they had been properly stored and secured, the fact of the sailing, given the death of the master, shifts the burden to the plaintiff to adduce evidence that there was any impropriety in the storage of the cargoes. As for contention (6), the plaintiff relied on the evidence of Sairin bin Rasid which I totally discredited as a result of the skilful cross-examination of learned counsel for the plaintiff. I do not see how I can rely on his evidence that he does not know anything about the stability booklet to conclude that such a booklet was not carried by the vessel. Here again, it was not pleaded that there was a failure to keep such a booklet and that such a failure made the vessel unseaworthy. In the premises I find no merit at all in all the arguments of the plaintiff concerning this point.

Boom not lowered

It was argued that the boom of the crane of the vessel was near an upright position as shown in a photograph after the vessel had sank. The *chin choo* explained that the position of the boom was moved by thieves who had gone on board the sunken vessel to steal. I also have no reason to disbelieve him. In fact from his demeanor I find him to be a simple but honest person whose evidence I have no hesitation to accept. The expert Mohana Das Nehru, called by the plaintiff, had said that the near upright boom had caused instability of the vessel and contributed to the rolling of the vessel. That evidence was upon the supposition that at the time of the rolling, the boom was at that position. However, I accept the evidence of the *chin choo* that the boom was lowered when the vessel set sail. Therefore, there is also no merit in this contention.

Stowage on forecastle and store space

This is what Mr Tang said in his submission:

> These two areas are never intended for the purpose of storage/stowage of cargoes. The plaintiff's cable that were stored on the forecastle created an obstruction to the mooring/anchoring equipment and might have caused damage to the same during the shifting and movement of the plaintiff's heavy cable drums. This may explain why the defendant never attempted or failed to activate its mooring/anchoring equipment before the vessel was grounded

That is not only pure conjecture but against the weight of the evidence of the *chin choo* who was on that fateful voyage. He had said that there was no problem working the anchor which worked on generated power, which

A evidence I accept. Even the evidence of the expert called by the plaintiff says that the anchor may not be able to be dropped because of the weather which the *chin choo* said was the reason and which I accept.

Vessel got stranded at Kuala Bintulu — echo sounder

B It was the evidence of the *chin choo* that the vessel after encountering the bad weather attempted to make its way to Kuala Bintulu. The expert testified that the master would not have been able to negotiate its entry into Kuala Bintulu because the marine chart show the water to be too shallow and there was an isolated danger buoy at that location making it unsafe to head for that direction. These, according to learned counsel, show: (1) that the C master either did not have an admiralty chart or, if he had one, he did not interpret it correctly; and (2) that the grounding of the vessel was the result of the absence of an echo sounder on the vessel. These show a failure of due diligence to make the vessel seaworthy, argued learned counsel. It was also postulated that the master should have anchored the vessel outside Kuala D Bintulu and asked for pilotage services but did not. It was also contended that even if anchoring was not possible the vessel could still weather the storm by facing the sea and wait for assistance. It was finally suggested that the vessel should have sought shelter elsewhere. The failure to take any of those steps meant that the master was negligent, so argued learned counsel. All these matters were not the subject of any pleading. It was the argument E of Mr Tang that the defendant must prove that they have exercised due diligence before they can rely on the exceptions. Since seaworthiness can be in so many aspects, beginning with the building of the vessel to its maintenance, its equipment, its crew and its voyage, it would be impossible for a defendant to introduce evidence regarding the exercise of due diligence with regard to all of them. Surely, a defendant is only required to F show due diligence in respect of areas where a plaintiff has alleged it was lacking. This means a plaintiff must deliver a reply to say in which area due diligence was lacking. There was none in the present case. In any event, I have no reason to doubt the correctness of the entry made by the master, since deceased, in the official log book though it may not have been G maintained properly. The contemporaneous entries in the official log book together with the evidence of the *chin choo* proves on a balance of probabilities that the vessel met with a peril of the sea or an act of God which led to its sinking and consequently the loss of the cargoes. The evidence show that the vessel encountered boisterous and rough weather with three metre-high waves and 40-knot strong wind. This condition was H confirmed by a witness of the Meteorological Department. According to the master, this condition brought about the breakage of the lashings holding the cargoes and caused them to shift to the right. This resulted in the titling of the vessel to the right bringing water into the vessel. The master then changed course and proceeded to Kuala Bintulu where the vessel went aground and later sank together with the cargoes. As mentioned earlier, the I plaintiff contended that the vessel should not have proceeded to that place since the admiralty chart showed the place to consist of shallow water. This means, the plaintiff alleges, negligence on the part of the master, a matter

that was not only not pleaded but canvassed for the first time when learned counsel for the plaintiff made his closing address, which address was the final address which the court heard before it rose to consider its judgment. I agree with learned counsel that the point does not merit consideration. That being the position, I am of the view that the weather and sea condition brought about the sinking of the vessel and that is an act of God or a peril of the sea within the meaning of the Hague Rules.

Other matters

The plaintiff also raised the matter of the official log book not being kept properly which I have considered and dismissed as being without substance and which does not detract from the truth of the entries made there. They also questioned why no radio call was made but the master had a hand phone which he used and he also had fired distress flare. The plaintiff in striking out at just about anything complained of the water pump not being worked but the evidence showed that it was of no help since the water had gone into the vessel to the level of the port holes. They finally also took pot shots at certain aspects of the Safety Equipment Certificate having expired and of there being irregularities, like not having enough life jackets, carrying cargoes in the vessel's stores — all of which are of no merit and do not in the least affect the fact that the cargoes were lost due to a peril of the sea or an act of God and all those matters referred to did not make the ship unseaworthy nor did they contribute to the loss of her cargoes. The plaintiff had called its expert after the defendant had concluded its case and it was for the purpose of rebutting the evidence of the defendant's witnesses. Instead, the witness went on to postulate and opine how the master should have navigated the vessel and how he should have avoided Kuala Bintulu. Those evidence are not relevant because it is not rebuttal but laying down evidence for the contentions of the final address which learned counsel for the plaintiff made.

Position at common law

Even if the Hague Rules do not apply to this case, the result would be the same as the defendant would nevertheless be entitled to rely on the defence of act of God which has been established.

Conclusion

In the premises the plaintiff's claim is dismissed with costs to the defendant.

Claim dismissed.

Reported by Jafisah Jaafar